State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

RECEIVED-FPSC
99 APR 12 PM 2:04
RECORDS AND REPORTING

DATE: APRIL 12, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF COMMUNICATIONS (AUDU, DOWDS)
DIVISION OF LEGAL SERVICES (MCKINNEY) JCM MCB

RE: DOCKET NO. 981052-TP - PETITION BY TELEPHONE COMPANY OF CENTRAL FLORIDA, INC. FOR RESOLUTION OF ITEMS UNDER DISPUTE IN RESALE AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC.

AGENDA: 4/20/99 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMU\WP\981052.RCM

CASE BACKGROUND

On August 20, 1998, Telephone Company of Central Florida, Inc. (TCCF), filed a petition for resolution of items under dispute in its resale agreement with BellSouth Telecommunications, Inc. (BellSouth or BST). The issues raised in the petition have been separated into issues of complaint for enforcement of the parties' current resale agreement, and issues for arbitration of the renewal of the agreement. An evidentiary hearing covering the issues raised in TCCF's petition was held on January 22, 1999, and continued on February 9, 1999.

This recommendation addresses two of the three issues at the hearing. Arbitration Issue 1 will be the subject of a recommendation at the May 4, 1999, Agenda Conference.

DISCUSSION OF ISSUES

COMPLAINT ISSUE:

ISSUE 1: Has BellSouth provided TCCF with ESSX® service in compliance with the parties' resale agreement for periods of time not covered by settlements and adjustments made regarding ESSX®? If not, what action, if any, should the Commission take?

RECOMMENDATION: No. Staff recommends that the Commission order BST to fulfill all requests for installation of ESSX service placed after March 14, 1997, which are associated with the original May 29, 1996 order placed by TCCF, and that the service be provided for the full 73 months from the day the service is implemented. (**AUDU**)

POSITIONS OF THE PARTIES

TCCF:

No. BellSouth has not provided TCCF with ESSX in compliance with the resale Agreement. BellSouth has never been able to adequately provision ESSX resulting in continual disruption for TCCF customers. To remedy BellSouth's nonperformance, TCCF should be permitted to resell ESSX in the new Resale Agreement.

BELLSOUTH:

Yes. Tariffed services, except grandfathered services, were available for resale under the Resale Agreement. ESSX® Service was grandfathered May 30, 1996, and was unavailable to new customers under BellSouth's tariff. TCCF's requested nonstandard arrangement was not a tariffed service. BellSouth complied with the Agreement after the dates of the settlements and adjustments.

STAFF ANALYSIS:

In the parties' Resale Agreement of May 28, 1996, Section III (A) provides in part:

> Reseller may resell the tariffed local exchange, including centrex type services available under Section A12 of the Florida tariff, ... Notwithstanding the foregoing, the following are not available for purchase:

> Grandfathered services; promotional and trial retail service offerings, ... (EXH-8, 2; EXH-11, 2)

At the crux of this issue is the question: Did BST provide ESSX service to TCCF for resale per the May 28, 1996, Resale Agreement? To answer this question, one must recognize that whether or not the requested ESSX service was standard (i.e., as tariffed in Section A12 of BST's tariff) or nonstandard (i.e., anything not tariffed in Section A12 of BST's tariff) is irrelevant. The contract for ESSX required performance. Therefore, it is important that the issue is not transposed from a question of performance to a question of nomenclature. The record shows that either as a standard or nonstandard ESSX, BST is obligated either by the Resale Agreement or Bona Fide Request/Business Opportunity Request contracts to perform. Furthermore, staff interprets the phrase "..., not available for purchase:" as used in the Resale Agreement to mean that TCCF may not order grandfathered services, but requests for installation must be honored, even though the service may have been grandfathered after the order date.[1]

TCCF witness Ripper states that at no time during the contract period did BST ever indicate that TCCF was not entitled to resell ESSX service. Witness Ripper argues that the Resale Agreement specifically provides for TCCF to resell ESSX, and therefore he believes the subsequent grandfathering of ESSX did not affect TCCF's ability to resell ESSX. (TR 324, 336; EXH-3, 1-2) Witness Ripper testifies that the resale of ESSX service was the primary service to be provided by the Company. Witness Ripper states that ESSX service could be resold for 1/6th less than the regular local service business rate. Therefore, the provision of ESSX service was the focus of TCCF's business plan. (TR 17-18) BST witness Hendrix admits that the agreement provides TCCF the ability to resell Centrex type services and that ESSX was not grandfathered until May 30, 1996. Witness Hendrix then argues that Section III (A) of the Resale Agreement specifically precludes TCCF from reselling grandfathered services. (TR 192) Witness Hendrix states that BST should have notified TCCF that ESSX was unavailable for resale, but instead, BST continued to work diligently to provision ESSX, even though TCCF requested features and functions that the service was not intended to provide. (TR 195-196) BST witness

---

[1] According to BST witness Hendrix, "TCCF has received the pricing benefits associated with a seventy-three month pricing arrangement for BellSouth's ESSX service, as well as the ability to resell that grandfathered service to new customers for the past two years." (TR 198)

Cathey testifies that as late as November 1998, TCCF still ordered[2] ESSX, and conceded that even as late as November 1998, BST did not inform TCCF that it could not resell the grandfathered ESSX. (TR 436, 443) TCCF witness Ripper explains that because of ESSX's lower price points, it was important to put the order in before May 30, 1996, the date that BST grandfathered ESSX service. (TR 35, 192) The TCCF witness states that it was his understanding, as presented by BST's resale team, that if TCCF bought ESSX service prior to grandfathering, then TCCF would be grandfathered in and not grandfathered out. Witness Ripper concludes that TCCF made a commitment for 23 201 line ESSX M systems on May 29, 1996, with the understanding that the service could be provisioned at any time thereafter for the 73 month tariff period. (TR 53, 54-55, 64) BST witness Hendrix states that ESSX service was only to be provided for the duration of the resale agreement and that the 73 month tariff provision only allowed TCCF to have the best price afforded by the tariff. (TR 198)

Staff notes that Section III (A) of the Resale Agreement allows TCCF to resell ESSX. Both BST and TCCF agree that the resale agreement provides TCCF the authority to resell ESSX. However, the parties disagree on whether TCCF had the ability to resell ESSX after grandfathering on May 30, 1996. A narrow interpretation of the resale agreement leads one to conclude that TCCF had the ability to resell ESSX service for only two (2) days, and that once ESSX was grandfathered on May 30, 1996, TCCF lost its ability to resell ESSX. However, a broader interpretation of the resale agreement is more consistent with BST's actions allowing TCCF to purchase 23 201 line ESSX M systems for resale just two days before grandfathering. (TR 192, 198) Moreover, BST continued to work with TCCF to attempt to provision the resold ESSX for over two years after the ESSX service had been grandfathered. (TR 436)

According to TCCF witnesses Ripper and Koller, TCCF placed an order on May 29, 1996, for 201 line ESSX M systems for 23 wire centers for a duration of 73 months. (TR 18, 54, 74) Witness Ripper states that this is the equivalent of 5,000 lines. (TR 30) Witness Ripper argues that BST did not provide ESSX as required by the

---

[2] Staff believes that BST's used of the term "order" in this instance is subject to interpretation. Staff believes that this confuses the issue with the order placed by TCCF on May 29, 1996, just before the grandfathering date. Staff believes that in its May 29, 1996, order, TCCF effectively reserved this block of lines for future installations. Staff, therefore, believes that "order" as used here implies TCCF's request for installation dates as it signs end-user customers for the already ordered 201 line ESSX M systems. (TR 436)

resale agreement, and as a result, TCCF has lost a large portion of its customer base back to BST. Witness Ripper testifies that as of the date of hearing, BST had only provisioned 150 lines and concludes that BST has failed to perform and is in violation of the resale agreement. (TR 22, 30, 323, 327) Witness Ripper testifies that TCCF has approximately 3000 lines which were to be provided as ESSX, which are presently being provisioned with BST's other services at higher rates than ESSX. (TR 34, 35) Witness Ripper testifies that TCCF and BST entered into a settlement agreement that covered the period up to March 14, 1997. According to witness Ripper, BST agreed to remedy the ESSX provisioning problems. However, witness Ripper states that the problems that existed prior to the settlement continued. (TR 23) BST Witness Cathey concedes that BST had problems converting TCCF customers to ESSX. (TR 423) BST witness Hendrix concedes the same and explains that this resulted in a Confidential Full Release and Settlement of all claims that TCCF may have had against BST from the time TCCF placed its orders (installation requests) through March 14, 1997. (TR 196) In addition, the problems continued and BST made further adjustments to compensate TCCF in October of 1997. (TR 197)

Staff notes that both parties agree that BST encountered problems provisioning ESSX service for TCCF. Both parties agree that there was a confidential full release and settlement agreement for provisioning problems through March 14, 1997. Further both parties agree that TCCF ordered 23 201 line ESSX M systems just before ESSX was grandfathered. There is record evidence that these ESSX systems were not fully provisioned by BST. There are conflicting numbers, however, as to how many ESSX lines BST has provisioned to date. Thus, staff believes that TCCF has outstanding ESSX lines pending provisioning.

TCCF witness Koller testifies that with every attempt BST made to provision ESSX, TCCF generally lost those customers to BST due to BST's inability to transition the customers. Witness Koller argues that BST intentionally delayed the implementation of the resold ESSX as evidenced by the numerous account teams that handled TCCF's resale orders installation requests), thereby severely limiting TCCF's capability to perform. (TR 74-76, 78, 80) Witness Koller contends that BST is acutely aware of the architecture of the ESSX plan and that BST was aware of how significant the ESSX service and the ability to route long distance through ESSX was to TCCF's offering of ESSX. (TR 87-88) BST witness Cathey concedes that BST had problems converting TCCF customers to ESSX and explains that "..., it is important to note that TCCF was one of BellSouth's first ALECs in Florida, and the only one who used a grandfathered service to provide dial tone in a non-traditional manner from how the service was originally designed." (TR 423, 428, 437) Witness Cathey further argues that delays in provisioning TCCF's ESSX were due in part to the fact that BST found the implementation more difficult than it had believed. (TR 425) Witness Cathey asserts that in view of the conversion problems encountered after the March 1997 settlement agreement, BST made another settlement payment to TCCF. (TR 448) Witness Cathey testifies that in order to provide TCCF the necessary information to allow TCCF to bill its end user customers for long distance, BST proposed a very unique arrangement using a PRI (an ISDN interface) that interconnected into the common block. This arrangement terminated into WilTel's long distance interface, thereby providing the needed call detail information for TCCF to bill its end-user customers for long distance service. (TR 434) Witness Cathey argues that due to the arrangement to provide TCCF the call records, the whole ESSX arrangement became a nonstandard arrangement. Hence, BST asked TCCF to submit a business opportunity request (BOR). (TR 436, 445) The BST witness concedes that ESSX customers have the option of system message detail recording (SMDR), which provides the customer's call details. (TR 462) Witness Cathey testifies that it was TCCF's business plan to resell the full capacity of the 201 line ESSX M system, and that BST has provisioned several hundred resold ESSX lines to TCCF end-user customers. (TR 440-441)

Both parties agree that BST experienced problems provisioning TCCF's ESSX installation requests. The parties also agree that BST has not completed provisioning all of the ESSX lines that TCCF ordered. Staff notes TCCF's assertion that BST kept changing the account teams that interfaced with TCCF. Staff agrees with TCCF that changing account teams could constitute an intention to delay implementation of service. In this instance, it appears there was a lack of continuity from one account team to another, thus, drawing out the implementation time and therefore limiting TCCF's ability to implement its business plan. (TR 87-88) Staff also notes that BST was aware of TCCF's long distance offering using ESSX. (TR 434) TCCF signed a BOR to have the necessary modifications that would provide the needed call records, although it is not clear if these modifications were necessary. (TR 445) Staff understands that SMDR could provide call records. Staff, however, finds no record evidence to indicate whether SMDR could or could not provide the needed call records that necessitated the installation of the PRI interface. (TR 466) Staff notes that SMDR is an ESSX feature that is tariffed in Section A12. (TR 462) The record supports the fact that BST encountered difficulties in provisioning the resold ESSX, and that BST did not provision all the ESSX service installations that TCCF requested. Therefore, staff believes that BST is obligated to fill outstanding installation requests TCCF submitted.

In his testimony, TCCF witness Koller testifies that all the features in the A12 tariff can make up a standard ESSX system. Witness Koller argues that some ESSX systems require special engineering (which are covered by special assembly), but asserts that the need for special engineering did not render the ESSX arrangement a nonstandard arrangement. (TR 90) Witness Koller further argues that until this proceeding, he never heard BST refer to the TCCF's ESSX arrangement as nonstandard. (TR 90) Witness Koller states that per BST's recommendation, TCCF's original configuration included a digital trunk termination - a standard tariffed ESSX provision. Witness Koller then states that BST knew that TCCF needed billing information in order to bill end-user customers, hence the reason for recommending the dedicated service - a tariffed offering. (TR 95) Witness Koller argues that it was BST, not WilTel, that determined that a T1 access capability (to facilitate the PRI interface) was necessary in order to furnish TCCF with the billing information needed to bill for long distance. Witness Koller states that it was first a special assembly, later changed to a Bona Fide Request (BFR). (TR 92) Witness Koller testifies that TCCF never requested a special assembly for the T1 application; instead, it was BST that required the T1 application in order to enable BST's recommended automatic route selection and T1 arrangement to work properly. (TR 90-91) According to BST witness Cathey, TCCF requested installation of ESSX service, but requested a nonstandard[3] interconnection arrangement using a T1 for direct access to WilTel's point of presence (POP). (TR 421) According to BST witness Wilburn, a nonstandard type arrangement is any arrangement that differs from the typical arrangement BST deploys. (EXH-2, 29) Witness Cathey states that this interconnection arrangement was nonstandard because BST's account team and network organization were not familiar with this type of arrangement. Witness Cathey further testifies that BST had no knowledge of using ESSX to provide local dial tone using assumed dial 9. (TR 421) Witness Cathey argues that TCCF's proposed application of ESSX in a wholesale environment was very unique compared to what BST was familiar with in a retail environment. (TR

[3] BST witness Cathey testifies that seeing how TCCF wanted to apply ESSX, BST "..., came up with a nonstandard arrangement, ..., the bottom line is, we did not have a primary rate interface that terminated into a long distance carrier, and so we had to develop one. We also had software that did not exist in central office types that if this had been a standard arrangement through ESSX product line, we would not have ... upgraded those offices." (TR 435)

432) Witness Cathey argues that BST could provision ESSX as TCCF had requested (for T1 circuits from the ESSX common block to WilTel's POP); however, BST pointed out that "[t]he only way to pass ANI out of an ESSX service common block was to terminate Primary Rate Interfaces (PRIs) into it." Since these were not standard features with ESSX, TCCF had to revise its original design and submit a business opportunity request (BOR) for these features. (TR 421-422, 434) Witness Cathey contends that BST has an obligation to provide the ESSX as described in its tariffs, and to provide the nonstandard arrangement as agreed in the BOR. (TR 445, 447; EXH-23, 25)

The negotiated agreement between the parties specifically states that BST will provide Centrex type services to TCCF. (TR 32) As discussed above, although BST appears to disagree that it had any obligation to provide ESSX service to TCCF, it continuously attempted to do so. In fact, BST even entered into a settlement agreement with TCCF because it did not provision the ESSX installation requests associated with the order which TCCF placed before the service was grandfathered.

Both parties agree that the features in Section A12 of BST's tariff provide for standard ESSX offerings. BST recommended the "nonstandard" interconnection in order to ensure that TCCF received the desired call records. (TR 95, 434) At issue is whether the nonstandard interconnection required for TCCF's desired ESSX arrangement superseded the tariffed ESSX, therefore making the whole ESSX system nonstandard. (TR 90) Staff disagrees with BST's definition of nonstandard because this definition could potentially brand an industry accepted alternative practice/arrangement as nonstandard just for the fact that BST is not deploying such alternative arrangement. (EXH-2, 29) Staff agrees with TCCF that the need for a special assembly does not render an ESSX arrangement a nonstandard ESSX arrangement in its entirety. (TR 98) Staff believes that since BST is provisioning the service, it is BST's responsibility to ensure that it designs a workable arrangement. Staff observes that Ms. Webb of BST signed Mr. Ripper's ESSX layout without any remarks that the layout might require modifications. Staff believes that this action could be construed to imply that the proposed layout was understood and workable. (TR 19; EXH-3, 13-14) BST later required TCCF to make some modifications to its initial ESSX arrangement; staff notes that TCCF complied with all BST required modifications. (TR 421, 434) However, staff observes that BST was probably out of its comfort zone in the sense that TCCF's arrangement was a wholesale provision compared to the traditional retail provisioning whereby BST sold the end-user customer its "proven" layout. (TR 432, 452) Staff agrees with witness Cathey that BST is obligated to provision the arrangement whether it is standard or nonstandard. Staff believes that both parties agree that there are Resale and BOR contracts which obligate BST to perform. Staff believes that the issue is not whether TCCF requested a standard or nonstandard arrangement, but whether there are legitimate grounds to require BST to perform. The record shows that there are legitimate grounds, namely the Resale Agreement and the BOR. Staff believes that the Resale Agreement covers the ESSX service and the BOR covers the "nonstandard" interconnection necessary to provide TCCF the required call records for TCCF to bill for its long distance service. (TR 455, 447)

Conclusion

Based on the evidence in the record, staff believes that BST has an obligation to provision the 23 201 line ESSX M systems TCCF ordered on May 29, 1996. The order was placed and accepted by BST before the service was grandfathered in the tariff. The record shows that BST's account team still entertained resale installation requests from TCCF as late as November 1998. It appears logical that TCCF secured the ability to market ESSX even after the service was grandfathered by placing its order on May 28, 1996 prior to grandfathering. (TR 198) Staff believes that TCCF's actions of reselling ESSX all through the period of the contract are consistent with the BST account team's actions of continuous effort to provision TCCF with ESSX. (TR 438) It is obvious that BST had difficulties provisioning ESSX to TCCF, and these problems have been detrimental to TCCF's business. Because of these difficulties, BST has not completely filled the installation requests TCCF placed, nor has TCCF utilized the full capacity of the ESSX systems that it ordered on May 29, 1996. Staff recognizes that TCCF agreed to a confidential full release and settlement agreement, releasing BST of all provisioning problems up through March 14, 1997. Thus, staff believes that BST should provide the balance of the installation requests associated with the ESSX systems TCCF ordered on May 29, 1996. These lines should run for the full 73 month period (per BST's tariff) beginning from the date of installation, and not be limited to the two year term of the negotiated resale agreement. Staff believes that BST is just as obligated today to provision the service that was ordered in May of 1996. Staff believes that whether as a standard or nonstandard ESSX arrangement, TCCF has legitimate contracts that obligate BST to perform. Thus, staff recommends that BST be required to fulfill all requests for installation of ESSX service placed after March 14, 1997, which are associated with the original May 29, 1996 order placed by TCCF, and that the service be provided for the full 73 months from the day the service is implemented.

ARBITRATION ISSUES:

ISSUE 1: **Arbitration Issue 1 will be the subject of a recommendation at the May 4, 1999, Agenda Conference.**

ISSUE 2: Should ESSX service be made available for resale in the new agreement?

RECOMMENDATION: Yes. Grandfathered ESSX service should be made available for resale in the new resale agreement to grandfathered ESSX end-user customers (existing customers). Grandfathered ESSX service should not be made available for resale in the new agreement to end-user customers that do not currently have ESSX (new customers). In addition, staff recommends that the Commission should encourage the parties to negotiate a "term and volume contract" to allow TCCF to resell MultiServ at or as close to the price points of ESSX and report back to the Commission in 90 days from the issuance of this order. This arrangement should be available for resale by other ALECs. (**AUDU**)

POSITION OF PARTIES:

TCCF:

Yes. BellSouth has not fulfilled its obligations under the current Agreement regarding ESSX resale. The only way this situation can be remedied is to include ESSX in the new Agreement for at least 18 months for the new customers and current customers. Alternatively, TCCF would accept MultiServ at the ESSX price.

BELLSOUTH:

No. ESSX Service is a grandfathered service under a lawfully filed and approved tariff of this Commission and is not available for resale.

STAFF ANALYSIS

This issue addresses whether the grandfathered ESSX service should be included in the new resale agreement to allow TCCF to resell the grandfathered service to new end-user customers that do not currently have ESSX. At the crux of this issue is the question "Who constitutes a 'new customer' for purposes of resale of the grandfathered ESSX service in the new resale agreement?" FCC Order 96-325, and Order No. PSC-96-1579-FOF-TP, support the opinion that while it is possible to construe a reseller to be a (wholesale) new customer to BST (i.e., TCCF), staff believes that a "new customer," as used in this proceeding, is a (retail) end-user customer of either BST or TCCF after May 30, 1996. Thus, eligibility for the grandfathered ESSX service hinges on whether the end-user did or did not have ESSX on May 30, 1996. Staff believes that any end-user customer that had ESSX by May 30, 1996, is grandfathered and eligible to continue to receive ESSX, whether from BST or TCCF.[4] (EXH-11, 28)

TCCF witness Ripper testifies that until testimonies were filed in this proceeding, the question of whether ESSX was available (in the current agreement) for resale to new customers had never been at issue. (TR 322, 336) BST witness Hendrix concedes that until his testimony, BST had never informed TCCF that it is precluded from reselling the grandfathered ESSX service to new customers. (TR 201) Witness Hendrix asserts that BST should have notified TCCF that it was not allowed to resell the grandfathered ESSX to new customers. (TR 195) Witness Hendrix argues that "just prior to grandfathering the service, the sales team, together with TCCF, thought that by entering into a seventy-three month pricing arrangement for BellSouth's ESSX Service, TCCF would be able to resell the service to new customers for the two-year term of its Resale Agreement." (TR 194, 198)

Staff believes that BST should have notified TCCF of this alleged "violation" of the grandfathering conditions for ESSX service. Staff is troubled with the fact that for two years, BST vigorously worked to provision ESSX for TCCF end-user customers, and all this while, it never occurred to BST that ESSX was grandfathered two days after TCCF signed its contract. (TR 192, 423) Staff is particularly troubled by the fact that this is the

---

[4] BST's ESSX Tariffs, which grandfathered ESSX service, provide that " service, ..., in this section are available for inward activity of existing subscribers only as specified in the obsolescence rules stated in A112.26. (EXH-11, 28)

same sales team that had worked together with TCCF to ensure that TCCF signed its resale agreement early enough to ensure that TCCF was grandfathered with the 73 month pricing arrangement. (TR 194) Staff is not convinced that BST's pronouncement of this grandfathering condition at this time is not ill-intended. (96-325, ¶968)[5] At a minimum, and equally disturbing, staff believes that the sales team misunderstood the effect of the grandfathering provision. (TR 438)

TCCF witness Ripper argues that BST did not provide ESSX "as required" by the current resale agreement, and asserts that as a remedy for BST's non-performance, ESSX should be included in the new resale agreement for current customers for the entire 73 month period. Witness Ripper contends that TCCF should be allowed to resell ESSX to new customers in the new resale agreement for at least 18 months as a remedy for BST's non-performance. (TR 24-25, 375, 378) According to BST witness Arrington, a grandfathered service is not available for sale to, or transfer between, end-users; instead, a new service is offered in place of the grandfathered service. Witness Arrington states that MultiServ is a substitute for the grandfathered ESSX. (TR 240; EXH-16, 55) Witness Arrington testifies that ESSX service was grandfathered as a Type-4 service, basically making it unavailable for new customers[6]. Witness Arrington states that the conditions of grandfathering ESSX allowed current month-to-month customers to continue to receive the service at the current rates until the tariffed expiration date. BST witness Hendrix asserts that TCCF can resell ESSX to existing ESSX customers. (TR 240, 229) Witness Hendrix then argues that the Commission does not need to take action because TCCF "..., should never have had the ability to resell BellSouth's ESSX Service, as a grandfathered service to new customers." (TR 194) Witness Arrington argues that the resale agreement was never amended after May 30, 1996; therefore, witness Hendrix contends, the 73 month agreement did not afford TCCF the ability to resell grandfathered ESSX to new customers. (EXH-16, 59; TR 195, 206) Both witnesses Hendrix and Arrington agree that TCCF was erroneously allowed to resell ESSX to new customers after it was grandfathered. (TR 194, 200, 242) Witness Arrington points out that to allow TCCF to resell the grandfathered ESSX in the new

---

[5] FCC 96-325, ¶968, reads, in part: "We are concerned that the incumbent LECs' ability to withdraw services may have anticompetitive effects where resellers are purchasing such services for resale in competition with the incumbent."

[6] Staff notes that this use of "new customer" by BellSouth could be construed to mean either wholesale or retail new customer.

resale agreement will make the grandfathered ESSX available for resale by all ALECs. (TR 242) Both BST witnesses assert that Commission Order and BST tariffs provide that grandfathered services are not available for resale to new customers[7]. (TR 198, TR 243)

Staff disagrees with TCCF's position regarding the inclusion of ESSX in the new resale agreement for resale to new end-user customers as a remedy for BST's non-performance in the current resale contract. Staff notes BST's argument that the resale agreement was not amended after May 30, 1996; therefore, the 73 month agreement did not afford TCCF the ability to resell ESSX to end-user customers that did not already have ESSX as of May 30, 1996. Staff believes that absent any amendment after May 30, 1996, it was reasonable for TCCF to resell ESSX to new end-user customers, since this was the understanding of both the sales team and TCCF at the signing of the resale agreement on May 28, 1996. (TR 194) Staff believes that any remedy due TCCF should be addressed in the Complaint Issue (i.e., Issue 1 above). Staff agrees with BST that FCC Order 96-325, ¶968 and Commission Order No. PSC-96-1579-FOF-TP, at 41, do not require reselling grandfathered services to new end-user customers; instead, these orders provide that such grandfathered services are available for the use of existing (grandfathered) end-user customers. Thus, staff believes that ESSX should not be included in the new resale agreement for resale to new end-user customers.

TCCF witness Ripper contends that BST's recent tariff filing to extend the grandfathered ESSX indefinitely for its customers is because BST has no service at the same price points which it can offer to these customers. Witness Ripper asserts that in order for BST to retain installation requests associated with these customers, BST has indefinitely extended the availability of ESSX. Witness Ripper argues therefore, that TCCF should be allowed to resell ESSX. (EXH-4, 37) BST witness Hendrix argues that BST's filing to extend ESSX indefinitely is to allow existing month-to-month and term payment customers, whose contracts have expired, to continue to benefit from the grandfathered ESSX service indefinitely. (TR 222)

Regardless of the indefinite extension of the grandfathered ESSX, per FCC Order 96-325, and Order No. PSC-96-1579-FOF-TP, BST's current ESSX end-user customers are still available to TCCF under resale. Staff notes, however, that absent this indefinite

[7] Same as Footnote #6 above.

extension, TCCF would not need to target any particular class of BST's end-user customers. Similarly, TCCF would not have the extra burden to research what service combination the end-user customer has before it markets a resale service to this end-user customer. Staff, therefore, agrees with TCCF that BST's recent filing which extends ESSX service indefinitely is troubling. Staff believes that with the indefinite extension, BST has gained and maintains a competitive advantage in the marketplace.[8] (EXH-13, 9) While TCCF and BST may provide the grandfathered ESSX service to the same set of end-user customers, the grandfathering adds an element of complexity to TCCF's marketing effort that would not otherwise exist.

TCCF witness Ripper argues that for TCCF's business needs, MultiServ could serve as a perfect substitute for ESSX. (EXH-4, 40; TR 25) The TCCF witness asserts that with the right bundling of ESSX, TCCF is able to utilize ESSX's flexibility to better serve its customers. Witness Ripper contends that despite the fact that MultiServ is already bundled, with the appropriate price points TCCF could still serve its customers with MultiServ. (EXH-4, 40) BST witness Hendrix testifies that he became aware of TCCF's plan to resell ESSX through Mr. Scheye. (TR 202) BST witness Arrington testifies that the FCC Order of August 8, 1996, specified that grandfathered services are available for resale for current customers; therefore, once ESSX became grandfathered, BST was no longer obligated to make the grandfathered ESSX available to TCCF for resale to new customers. (TR 383) Both BST witnesses agree that MultiServ is a bundled service which makes it more customer focused and easier to order. (TR 219; EXH-16, 55)

Both BST and TCCF agree that MultiServ is a bundled substitute service for the grandfathered ESSX service and provides more value for the end-user customers. Both parties also agree that MultiServ is priced higher than the grandfathered ESSX service. Staff, therefore, is concerned that denying TCCF the ability to resell ESSX, without any recourse but MultiServ, has the potential to drive TCCF out of the business completely since TCCF's "flagship"

[8] In its recent filing to extend grandfathered ESSX indefinitely, BST explains that the extension was necessary because "The effort made to convert the existing month to month ESSX service subscribers to MultiServ service ... before 12/31/98 was hampered by the size of the task, ... throughout the conversion effort BellSouth has preferred to **continue working with the subscribers on a non-adversarial basis instead of forcing conversion or disconnection of service**. BellSouth has determined that forcing the conversion requirement may cause discontent both within the Company and in our relationship with our subscribers." (EXH-13, 9) Emphasis added.

product is ESSX based. This is a fact that BST admits it was aware of. (TR, 17-18)

TCCF witness Ripper further argues that TCCF will be disadvantaged if it goes back to its customers with a different product at higher price points. Therefore, he believes TCCF should be allowed to resell MultiServ for the same price as ESSX. (EXH-4, 41; TR 26) BST witness Arrington argues that the Commission should not require BST to make the grandfathered ESSX available for resale to new customers, and asserts that it is inappropriate for the Commission to require BST to offer MultiServ to TCCF at the same price points as ESSX. (TR 382, 384) Witness Ripper argues that the primary problem with TCCF reselling MultiServ in place of ESSX is that MultiServ is priced approximately 40% more than ESSX. Witness Ripper further argues that BST should offer MultiServ to TCCF at a special contract-based term and volume arrangement at the same price points as ESSX. (TR 26; EXH-4, 43) Witness Ripper contends that this special contract can be achieved with BST's individual case basis (ICB) pricing which BST uses for its commercial customers. The TCCF witness asserts that the ICB pricing offers up to 35% discounts in the pricing of complex services in competitive environments. Witness Ripper states that with a 35% discount on MultiServ, TCCF can resell MultiServ competitively. (EXH-4, 41) According to BST witness Wilburn, his account team in conjunction with other BST pertinent personnel explored the possibility of working out a special pricing arrangement for MultiServ in place of ESSX for TCCF on numerous occasions. However, no decision was reached because BST believed there were concerns that required more research. Witness Wilburn testifies that he advocated the "special pricing arrangement" because it was his "..., job in the company to try to figure out a way that I can provide them a vehicle to do business with." (EXH-2, 35-39) BST witness Hendrix contends that BST is not obligated to offer TCCF a contract service arrangement (CSA), but indicates that BST will consider the idea of a CSA for TCCF, in which case such a CSA will be available for resale by other ALECs. (EXH-14, 88, 91)

Staff agrees that TCCF is potentially disadvantaged when it attempts to resell MultiServ, a product that is "practically" ESSX, for approximately 40% more than ESSX to its class of end-user customers. Staff notes that TCCF has expressed interest in and BST has indicated a willingness to consider a special contract through which TCCF will resell 'centrex' like services to new end-user customers in place of the grandfathered ESSX. Staff observes that both BST and TCCF will henceforth market MultiServ service to new end-user customers, alike. However, staff believes that BST has a competitive advantage with the statutory authority to offer any of its prospective new end-user customers a CSA[9]. While TCCF could resell this CSA after the fact, TCCF does not possess such ability at the outset. Staff believes that TCCF's lack of such capability to offer a CSA to a new end-user customer (that may require a CSA in order to go with TCCF) disadvantages TCCF. Staff therefore believes that a special contract arrangement that will allow TCCF to resell MultiServ in place of ESSX is critical in resolving this issue fairly. Staff observes that TCCF is probably one of the few ALECs reselling grandfathered ESSX from BST and wants to continue to resell this service in its new resale agreement. (TR 423) Thus, staff recommends that the parties be strongly encouraged to negotiate a term and volume contract for MultiServ, with discounts at the same price point or as close as possible to the price points of ESSX, in the new resale agreement.

CONCLUSION

Based on the above analysis and the evidence in the record, staff believes that grandfathered ESSX service should not be included in the new resale agreement for end-user customers that did not already have ESSX as of May 30, 1996. However, end-user customers that already had ESSX by May 30, 1996, can continue to use the grandfathered ESSX service available in the resale agreement. Staff also believes that TCCF will be disadvantaged if it has to resell MultiServ, a substitute for the grandfathered ESSX, to its class of end-user customers for approximately 40% more than ESSX. Further, staff believes that BST's filing to grandfather ESSX indefinitely is designed to retain its current ESSX end-user customers that BST may lose, if these end-user customers were compelled to migrate to the higher priced MultiServ. Thus, staff recommends that grandfathered ESSX service should be made available for resale in the new resale agreement to grandfathered ESSX end-user customers. Also, grandfathered ESSX service should not be made available for resale in the new agreement to end-user customers that do not currently have ESSX (new customers). In addition, staff recommends that the Commission should encourage the parties to negotiate a "term and volume contract" to allow TCCF to resell MultiServ at or as close to the price points of ESSX and report back to the Commission in 90 days

[9] Chapter 364.051(6)(2)(a) reads in part as: "... Nothing contained in this section shall prevent the local exchange telecommunications company from meeting offerings by any competitive provider of the same, or functionally equivalent, non-basic services in a specific geographic market or to a specific customer by deaveraging the price of any non-basic service, ..., using volume discounts and term discounts, and offering individual contracts."

from the issuance of this order. This arrangement should be available for resale by other ALECs..

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open to allow staff to address Arbitration Issue 1 which will be the subject of a recommendation at the May 4, 1999, Agenda Conference.(**MCKINNEY**)

STAFF ANALYSIS: This docket should remain open to allow staff to address Arbitration Issue 1 which will be the subject of a recommendation at the May 4, 1999, Agenda Conference.